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(3)

In The

Supreme Court of the United States

October Term, 1993

JOHN W. SELCH,

Petitioner,

v.

CHRISTINE W. LETTS, in her official capacity as the Director of the INDIANA DEPARTMENT OF HIGHWAYS; DANIEL A. NOVRESKE, in his official capacity as the Chief Deputy Director of the INDIANA DEPARTMENT OF HIGHWAYS; ROBERT D. BOXELL, in his official capacity as the Chief of the Personnel Services Division of the INDIANA DEPARTMENT OF HIGHWAYS; and FREDERICK GLASS, in his official capacity as the Governor's Executive Assistant for Transportation,

Respondents.

On Petition For Writ Of Certiorari To The United States Court Of Appeals For The Seventh Circuit

BRIEF IN OPPOSITION

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QUESTION PRESENTED FOR REVIEW

Whether the United States Supreme Court should issue a writ of certiorari where:

a. the Seventh Circuit opinion does not directly conflict with the Fourth Circuit Court of Appeals' opinion in *Akers v. Caperton*, 998 F.2d 220 (4th Cir. 1993);

b. the Petition misinterprets the record; and

c. the underlying opinions of the District Court and the Court of Appeals required findings of disputed fact which are not clearly erroneous.

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OPINIONS BELOW

The opinion of the Court of Appeals is reported as *Selch v. Letts*, 5 F.3d 1040 (7th Cir. 1993). The opinion of the District Court is reported as *Selch v. Letts*, 792 F. Supp. 1502 (S.D. Ind. 1992).

STATEMENT OF THE CASE

John W. Selch brought this action against the Defendants pursuant to 42 U.S.C. § 1983, alleging that he was discharged because of his political affiliation in violation of the first and fourteenth amendments to the United States Constitution.

Selch was employed in the position of subdistrict superintendent for the Indiana Department of Highways until his termination on June 23, 1989. The District Court found that Selch's termination was politically motivated but that his position was one for which political affiliation was an appropriate consideration, and the Court of Appeals for the Seventh Circuit agreed.

ARGUMENT

The decision of the Court of Appeals is correct and does not conflict with the opinion of the Fourth Circuit Court of Appeals in *Akers v. Caperton*, 998 F.2d 220 (4th Cir. 1993). Furthermore, the determination made by the District Court and affirmed by the Court of Appeals is highly dependent upon the facts and not susceptible to review on certiorari.

The opinions of the Seventh and Fourth Circuits in *Selch* and *Akers*, respectively, can be reconciled and do not present a conflict. The question whether a position is one for which political affiliation may properly be a criterion is a question of fact. *Nekolny v. Painter*, 653 F.2d 1164, 1170 (7th Cir. 1981), *cert. denied*, 455 U.S. 1021 (1982). The courts in *Akers* and *Selch* evaluated different positions and were presented with different facts. Although the two Courts of Appeals reached different conclusions, the opinions are not inconsistent because the facts are distinguishable.

The District Court in *Akers* was confronted with an amendment to a state statute, W. Va. Code § 29-6-4(d), which specified those positions for which political affiliation was an appropriate consideration. 998 F.2d at 222-23. The amendment added county maintenance superintendents to the list of those positions, although the two immediately superior positions were not so included. *Id.* at 225. The District Court noted that the amendatory language in W. Va. Code § 29-6-4(d) was politically timed and inserted by a Senate Committee chaired by Governor Caperton's campaign manager, *id.* at 226 n. 9, and found the statute unconstitutional as applied to the road maintenance position in question. *Id.* at 225. Similar findings were not made in *Selch*.

Furthermore, the District Court in *Akers* found that the county maintenance superintendent " 'receives close day-to-day and technical assistance from the District Maintenance Assistant,' " and that the defendants failed to identify on summary judgment any substantial policy decisions which were within the discretion of the county maintenance superintendent. *Akers v. Caperton*, 797 F.

Supp. 514, 518 (S.D.W. Va. 1992). The position at issue in *Akers*, therefore, is fundamentally different from that held by Selch.

After a full bench trial, the District Court found in *Selch*, and the Seventh Circuit agreed, that "the subdistrict superintendent position involved more than the mundane application of the maintenance guidelines. [Sibbitt] referred to the Operations Manual only once every three or four months. Other testimony indicated that the subdistrict superintendents decided where the road maintenance would be completed within the subdistrict." 5 F.3d at 1046. The District Court concluded that Sibbitt's testimony regarding the responsibilities of the subdistrict superintendent should be credited rather than Selch's, 792 F. Supp. at 1510, and the Court of Appeals properly did not disturb this finding. 5 F.3d at 1046.

The District Court also found, unlike in *Akers*, that the subdistrict superintendents' superiors were rarely present in the subdistricts, and that the subdistrict superintendent was required to make many important decisions, including where and when work was performed within the subdistrict. 792 F. Supp. at 1511. Selch and other subdistrict superintendents made significant contributions to the formulation of subdistrict budgets. 5 F.3d at 1045-46. The subdistrict superintendents also had a significant "potential impact on the actual or perceived implementation of policy" in the exercise of discretion necessary to act on public and governmental complaints and requests. *Id.* at 1047.

The Petitioner's brief misstates the record when it concludes that the District Court and the Court of

Appeals focused "almost exclusively on the fact that Selch was a 'critical and highly visible representative of the state administration . . . ' " (Petition at 5). To the contrary, both the District Court and the Court of Appeals examined both the amount and the nature of the responsibilities inherent in Selch's position, consistent with *Elrod v. Burns*, 427 U.S. 347, 367-68 (1976). The Courts below then went on to determine whether, in the exercise of these responsibilities, a subdistrict superintendent could "threaten the goals of the in-party." 5 F.3d at 1043, 1046-47; 792 F. Supp. at 1517. This analysis is similarly consistent with *Elrod*, 427 U.S. at 367, and *Branti v. Finkel*, 445 U.S. 507, 518 (1980).

Additionally, Selch claims that the "responsibility and discretion inherent in [the subdistrict superintendent] position is closely cabined by the goals, policies, and procedures established by superiors in the bureaucratic hierarchy." (Petition at 3). This position was argued and rejected below at both the District Court and the Court of Appeals based on specific factual findings which required the District Court to weigh the evidence and make assessments of credibility. 5 F.3d at 1045-46.

The Seventh Circuit Court of Appeals concurred in the District Court's factual determinations following a bench trial. The findings below are supported by substantial evidence and should not be disturbed. *Goodman v. Lukens Steel Co.*, 482 U.S. 656, 665 (1987); *Graver Tank & Mfg. Co. v. Linde Air Prod. Co.*, 336 U.S. 271, 274-75 (1949). This is especially true where, as here, the ultimate question is highly fact-sensitive and the Courts below applied the proper legal standards.

CONCLUSION

The determination made by the District Court and the Court of Appeals is primarily one of fact, and should not be disturbed. Furthermore, the Court of Appeals' opinion below does not conflict with the opinion of the Fourth Circuit in *Akers v. Caperton* because the facts of each case are distinguishable. For these reasons, the petition for a writ of certiorari should be denied.

Respectfully submitted,

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